# REPLY BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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19-98

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LINDA K. BUTLER,

Appellant,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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## APPELLANT'S REPLY ARGUMENTS

### I. The Secretary fails to support the assertion that the Board was not required to ensure substantial compliance with its February 2015 remand order.

The Veteran raised the theory to the Board that her in-service symptoms of vaginal bleeding, upper quadrant pain and tenderness, pelvic pain, and stomach pain were early signs of fibroids. R-650; *see Robinson v. Peake*, 21 Vet.App. 545, 553 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009) (requiring the Board to adequately consider all theories of entitlement to VA benefits that are either raised by the claimant or reasonably raised by the record). The Board then remanded the claim because "it [did] not appear that the Veteran ha[d] been given an explanation as to what caused her abdominal pain and subsequent symptoms." R-644. In that remand, it ordered a medical opinion to address whether "the Veteran's in-service symptoms were early signs of [ ] fibroids." R-646.

The three medical opinions that followed the Board's remand order did not answer that question. *See* Appellant's Br. at 13-18. The Secretary does not dispute this point in his brief—and it may therefore be deemed conceded—but instead asserts that "the Board was not bound by the inquiries of the February 2015 remand." Secretary's Br. at 10, 12; *see also id.* at 8, 9. *See MacWhorter v. Derwinski*, 2 Vet.App. 133, 136 (1992) ("Where appellant has presented a legally plausible position . . . and the Secretary has failed to respond appropriately, the Court deems itself free to assume . . . the points raised by appellant, and ignored by General counsel, to be conceded.").

But the law does not support his proposition and he provides no legal support for his premise. *See id.* at 8-10.

The Veteran did not ignore the existence of the June 2017 remand, contrary to the Secretary's position, and the Secretary does not explain how that remand erases the Board's duty to ensure substantial compliance with the February 2015 remand. *See id.* at 7-8; Appellant's Br. at 8-9 (statement of the case); Appellant's Br. at 15 (argument section quoting the July 2017 remand (R-371) that found the April 2015 examiner "offered no rationale for the opinions"). There is no basis in the law—and the Secretary cites to none—that when the Board issues a remand followed by another, it is not bound to ensure substantial compliance with the initial remand. Secretary's Br. at 7-10. Instead, "a remand by . . . the Board confers on the veteran or other claimant, as a matter of law, the right to compliance with the remand orders." *Stegall v. West*, 11 Vet.App. 268, 271 (1998).

In *Stegall*, the Board remanded appellant's claims for increased ratings for headaches and PTSD for neurology and psychiatric examinations. 11 Vet.App. at 269-70. The neurology examiner was not provided the claims file despite the Board's remand instruction that the file be made available to the examiner. *Id.* at 271. Further, a psychiatric examination never took place, and the Board rated the Veteran's PTSD based on hospitalization records. *Id.* at 270. The Court found that in deciding the claim based on that evidence, the Board ignored its remand order. *Id.* at 270-71. It held, without any such qualification that the Secretary now provides, "that a remand

by this Court or the Board confers on the veteran or other claimant, as a matter of law, the right to compliance with the remand orders." *Id.* at 271.

The Court should find that the same logic applies here because once the Board ordered the Regional Office to secure a medical opinion answering whether "the Veteran's in-service symptoms were early signs of [ ] fibroids," Ms. Butler's right to a medical opinion that answered that question vested. R-646; *Stegall*, 11 Vet.App. at 271. To date, the question of whether "the Veteran's in-service symptoms were early signs of [ ] fibroids," which the Board's February 2015 remand posed, remains unanswered. *Id.*; *see* Appellant's Br. at 13-16. Because of this, the Court should reject the Secretary's position and find that the Board failed to ensure substantial compliance with its February 2015 remand when it relied on the April 2015, May 2015, and July 2017 VA opinions to deny the claim. Appellant's Br. at 19-20.

Whether or not the "[t]he June 2017 remand narrowed the scope of the examiner's inquiry" did not change the fact that the Veteran was entitled to substantial compliance with the Board's February 2015 remand. Secretary's Br. at 8; *Stegall*, 11 Vet.App. at 271. Even if the 2017 examiner answered the question posed by the 2017 Board remand, the 2017 examiner did not answer whether the in-service symptoms were indicative of the fibroids that eventually led to her total hysterectomy. Appellant's Br. at 16. The examiner only pointed to the lack of a diagnosis in service, which is not in dispute, and did not adequately answer either the 2015 or 2017 Board remand questions.

As explained, the Board's 2015 remand question remains unanswered, and the Board's 2017 remand requested an opinion "as to the nature and etiology of any gynecological symptoms present during the period of the claims." R-372. Both remand instructions, therefore, required an opinion as to whether the Veteran's in-service symptoms were related to fibroids. R-372; R-646. Simply because the instructions were stated differently does not demonstrate that the Board found the 2015 remand instructions answered, and the Secretary does not assert that it did. Because none of the medical opinions answered the question posed by the Board in 2015, the Court should find that remand is warranted for an opinion that does. *Stegall*, 11 Vet.App. at 271. And for the reasons that follow, the Court should reject the remainder of the Secretary's arguments regarding the adequacy of the medical opinions.

*A. April 2015 VA medical opinion*

The April 2015 examiner stated that "[t]here was no[ ] evidence of fibroids during [the] veteran[']s service." R-437. In its June 2017 remand, the Board found that the examiner "offered no rationale" and "determined that the VA opinions of record [were] inadequate." R-371. The Veteran argued that any reliance on this opinion in the Board's decision on appeal was therefore clearly erroneous. Appellant's Br. at 15. The Secretary does not address this, so the Court may deem the point conceded. *See* Secretary's Br. at 8-9; *MacWhorter*, 2 Vet.App. at 136.

The examiner's opinion was also based on the inaccurate factual premise that the Veteran denied gynecological problems during service. R-433; *see* Appellant's Br. at 14-15 (citing, *e.g.*,). Service treatment records reveal consistent complaints and treatment for abdominal pain, pelvic pain, and irregular vaginal bleeding and discharge. *See*, *e.g.*, R-482, R-489 (week-long abdominal pain); R-532 (two-week-long vaginal discharge); R-586 (month-long, right lower quadrant abdominal pain and irregular vaginal bleeding); R-592 (recurrent abdominal pain); R-2240 (lower abdominal pain); R-2257 (two-month long pelvic pain); R-2266 (seven-months-long abdominal pain); R-2281 (irregular discharge). The Secretary argues that the service treatment records cited by the Veteran discuss "abdominal pain of unknown origin" and that "[t]hose records are relevant to Appellant's remanded claim for entitlement to service connection for a disability manifested by stomach and abdominal pain; they are not relevant to her surgical residuals claim." Secretary's Br. at 8-9. At the same time, he concedes that "the examiner did not explicitly discuss the records of vaginal discharge and spotting" during the Veteran's service. *Id.* at 9.

Initially, the fact that "[t]he bulk of the evidence Appellant cites to discusses abdominal pain of unknown origin" is precisely the reason the examiner needed to address the evidence in answering the question posed by the Board's remand: whether "the Veteran's in-service symptoms were early signs of [ ] fibroids." Secretary's Br. at 8; R-646. Because the examiner did not, the opinion was based upon an inaccurate factual premise and failed to comply with the Board's remand. R-

431; *see* Appellant's Br. at 14-15. And the Court should reject the Secretary's post hoc rationalization that the examiner did not need to address the in-service complaints because the records were not relevant to this claim and only relevant to another claim. Secretary's Br. at 8-9. The Board made no such finding, and "[i]t is not the task of the Secretary to rewrite the Board's decision through his pleadings filed in this Court." *Smith v. Nicholson*, 19 Vet.App. 63, 73 (2005) (rejecting Secretary's rationale for Board decision because "the Board did not set forth any such rationale"), *rev'd in part on other grounds*, 451 F.3d 1344 (Fed. Cir. 2006); *see also Simmons v. Wilkie*, 30 Vet.App. 267, 277 (2018) (holding that "the Court cannot accept the Secretary's post-hoc rationalizations" to cure the Board's reasons-or-bases errors).

Similarly, the Court should reject the Secretary's argument that the examiner's failure to discuss the Veteran's in-service symptoms of vaginal discharge and spotting was "likely due to the normal report of medical examination of record." Secretary's Br. at 9. Again, the Board did not make this finding. *See* R-8; *Simmons*, 30 Vet.App. at 277. And the examiner did not review and comment on all of the Veteran's service treatment records. *But see* Secretary's Br. at 9. Indeed, the Board explicitly found in the decision on appeal that the examiner only reviewed the Veteran's VA treatment records. R-8.

The Secretary's argument that the April 2015 VA opinion was based on a "thorough examination and interview of Appellant" must fail. Secretary's Br. at 9. And the Secretary's reliance on *Monzingo v. Shinseki*, 26 Vet.App. 97, 106-107 (2012)

for the premise that the opinion retained some probative value is misplaced because the medical opinion was based upon an inaccurate factual premise that the Veteran did not have gynecological complaints during service. Appellant's Br. at 14-15. Therefore, the opinion was entitled to no probative value. *See Reonal v. Brown*, 5 Vet.App. 458, 461 (1993).

Further, although the examiner was "presumed competent to comment on those records that she finds relevant to the medical questions posed to her," the Veteran never challenged the examiner's competence. Secretary's Br. at 9. Instead, she challenged the *adequacy* of her examination report. Appellant's Br. at 13-15. The legal concepts of competency and adequacy are separate and distinct. The presumption of competency goes to the qualifications of an examiner to render an opinion on an issue but the presumption does not extend to the adequacy of that examination. *See Parks v. Shinseki*, 716 F.3d 581, 585 (Fed. Cir. 2013) ("In the case of competent medical evidence, . . . VA benefits from a presumption that it has properly chosen a person *who is qualified* to provide a medical opinion[.]") (emphasis added). "[W]hether an examiner is competent and whether he has rendered an adequate exam are two separate inquires." *Mathis v. McDonald*, 834 F.3d 1347, 1351 (Fed. Cir. 2016) (Hughes, J., concurring in denial of rehearing en banc); *see Francway v. Wilkie*, 940 F.3d 1304, 1309 (Fed. Cir. 2019).

Despite the examiner's competence, she could not comment on the service treatment records that the Veteran cited because she did not review them. R-8; *but see*

Secretary's Br. at 9. That rendered the opinion inadequate. Appellant's Br. at 14; *see Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007) ("A medical opinion is adequate when it is based upon consideration of the veteran's prior medical history and examinations . . . so that the Board's 'evaluation of the claimed disability will be a fully informed one.'").

*B. May 2015 VA medical opinion*

The May 2015 examiner stated only that "the first mention of an apparent small fibroid" was in 1992, noting a normal gynecological examination in 1989. R-406; *see* R-9. The Secretary posits that the Veteran "ignores the examiner's finding that a December 1989 gynecological exam[ination], which included an abdominal and pelvic examination, was normal." Secretary's Br. at 15. This is not the case. As the Veteran argued, the examiner did not address whether, regardless of the purportedly normal service examination, the Veteran's symptoms that persisted following service until her diagnosis were caused by fibroids that potentially went undiscovered until 1992. Appellant's Br. at 15. Because of this, the examiner failed to provide the Veteran with an explanation as to what caused her abdominal pain [during service] and subsequent symptoms," which the Board's remand required. R-644; *see Stegall*, 11 Vet.App. at 271.

Further, the Court should decline to entertain the Secretary's statement that "[f]ibroids were not present in 1989, and there is no indication that they were present

during service." Secretary's Br. at 10. Neither he nor the Board are competent to make that medical determination. *Colvin v. Derwinski*, 1 Vet.App. 171, 175 (1991) ("BVA panels may consider only independent medical evidence to support their findings."). The Board needed adequate medical information to determine the answer to that question, which it failed to obtain. Appellant's Br. at 13.

*C. July 2017 VA medical opinion*

The July 2017 examiner addressed only whether Ms. Butler's fibroids, which led to her hysterectomy, were caused by the in-service tubal ligation. R-96-97. The Secretary asserts that "[t]he examiner also considered Appellant's lay statements about her in-service complaints but determined that it was less likely than not that her enlarged uterus originated in or was otherwise etiologically related to active service." Secretary's Br. at 8. But providing a conclusory statement that it was less likely than not that "the enlarged uterus that led to the Veteran[']s [h]ysterectomy originated during active service or is otherwise etiologically related to active service" did not comply with this Court's case law. R-97.

Although there is no reasons or bases requirement imposed on examiners, *Acevedo v. Shinseki*, 25 Vet.App. 286, 293-94 (2012), a medical opinion must still contain "sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one,'" *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 304 (2008). And it must contain information that the Board "can consider and weigh against contrary

opinions." *Stefl v. Nicholson*, 21 Vet.App. 120, 124 (2007). The 2017 opinion contained no such information. And the Secretary does not dispute the Veteran's argument that the opinion relied solely on the lack of an objective diagnosis of fibroids during service, so the Court may deem that point conceded. Appellant's Br. at 17; *see MacWhorter*, 2 Vet.App. at 136.

The Secretary also does not dispute the fact the examiner did not answer the question posed by the Board in its 2015 remand, and instead asserts that the Board was not bound by it. Appellant's Br. at 16-17; Secretary's Br. at 10. As explained above, he is incorrect, and his argument should be rejected. *See* Section I., *supra*. Nor does the Secretary argue that the Board ensured substantial compliance with the 2015 remand. Secretary's Br. at 11-12. He instead asserts that "the Board found that the combined medical opinions of record provided it with the information needed for it to make its determination regarding service connection." *Id.* at 11. But because none of the opinions addressed the Veteran's explicitly raised theory or answered the question posed by the Board in its 2015 remand, remand is required for an adequate medical opinion regarding whether "the Veteran's in-service symptoms were early signs of [ ] fibroids." R-646; *Stegall*, 11 Vet.App. at 271.

Finally, the fact that the Board was "entitled to assume the competence of [the] VA medical examiner" did not mean it was entitled to accept the inadequate opinion. Secretary's Br. at 10; *see Mathis*, 834 F.3d at 1351. The opinion was inadequate because it is unclear, at best, whether the examiner reviewed the Veteran's service

treatment records because she did not comment on them, and relied only on the lack of a formal diagnosis of fibroids during service. R-97; Appellant's Br. at 16-19. The examiner did not answer whether "the Veteran's in-service symptoms were early signs of [ ] fibroids," R-646, or explain "the nature and etiology of any gynecological symptoms present during the period of the claims," R-372, as required by the Board's 2015 and 2017 remands. Appellant's Br. at 18-19. Remand is, therefore, required. *Stegall*, 11 Vet.App. at 271.

## II. The Veteran's entitlement to service connection for scar residuals should be remanded as inextricably intertwined.

Should the Court agree that remand is necessary for the Board to ensure compliance with its 2015 remand and obtain an adequate medical opinion, remand of the Veteran's claim for scar residuals from the total hysterectomy is required because the claims are inextricably intertwined. Appellant's Br. at 20; *see Harris v. Derwinski*, 1 Vet.App. 180, 183 (1991) (holding that two issues are "inextricably intertwined" when they are so closely tied together that a final decision on one issue cannot be rendered until a decision on the other issue has been rendered), *rev'd on other grounds*, *Tyrues v. Shinseki*, 23 Vet.App. 166 (2009); *see also Ephraim v. Brown*, 5 Vet.App. 549, 550 (1993) (holding that inextricably intertwined claims should be remanded together). The Board conceded that "the Veteran has current scar residuals due to a hysterectomy," and the Court should not disturb that favorable finding. R-10; *Medrano v. Nicholson*, 21

Vet.App. 165, 170 (2007). Therefore, the issues are inextricably intertwined and should be remanded together. Appellant's Br. at 20-21.

## CONCLUSION

The Court should reject the Secretary's legally unsupported argument that the Board was not bound by its 2015 remand directives. That remand ordered a medical opinion to address whether it is at least as likely as not that the Veteran's in-service symptoms were early manifestations of fibroids. None of the VA examiners answered that question, and the Board erred as a matter of law by failing to ensure substantial compliance with its 2015 remand. The Secretary does not dispute this. Because the Secretary does not provide any legal support for the premise that the Board was not bound by the 2015 remand order, the Court should remand the Veteran's claim for an adequate medical opinion that complies with that order. Finally, the Court should remand the Veteran's claim for service connection for scar residuals as inextricably intertwined.

For the reasons above, and in the Veteran's opening brief, the Court should vacate the Board's decision to the extent that it denied entitlement to service connection for residuals of an in-service bilateral tubal ligation, and post service total hysterectomy and scar residuals of a total hysterectomy, and remand for further proceedings.

Respectfully submitted,

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